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In the
Supreme Court of the United States

OCTOBER TERM, 1964

No. 1[redacted]194

ABRAHAM BAKER,
PETITIONER,

v.

SIMMONS COMPANY,
RESPONDENT.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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This brief adopts the notations of the petition for references to the record appendices to the parties' briefs in the three prior appeals, abbreviating as follows:

No. 5962:
- 5962 I p. ...: "Vol I Record Appendix to Brief for Appellants"
- 5962 II p. ...: "Vol II Record Appendix to Brief for Appellants"
- 5962 III p. ...: "Vol I Record Appendix to Brief for Appellee"
- 5962 IV p. ...: "Vol II Record Appendix to Brief for Appellee"

No. 6137:
- 6137 p. ...: "Combined Volume, Record appendices of Appellant and Appellee"

No. 6383:
- 6383 I p. ...: "Record Appendix to Brief for Appellant"
- 6383 II p. ...: "Record Appendix to Brief for Appellee"

Other abbreviations:

PX.....: plaintiff's exhibit

DX.....: defendant's exhibit

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In the
Supreme Court of the United States

OCTOBER TERM, 1964

No. 1221

ABRAHAM BAKER,
PETITIONER,

v.

SIMMONS COMPANY,
RESPONDENT.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Foreword

Viewed even favorably to the Petitioner, this petition, if granted, would present the interesting ultimate question whether an alleged anti-trust violation that two courts have already said was not proved should give Abraham Baker license to use the name "Simmonds"

which was never his,

which he used in order to associate himself with Respondent,

which he pleaded falsely that he had derived from one whose name it was, and whose use of it antedated the Respondent's use of "Simmons" in their related businesses, and

which he sought to establish by the same false testimony, his own, and forged bill of sale that had earlier procured for him an injunction from the Superior Court of Rhode Island against another's use of "Simmons".

Citation To Opinions Below

The similarly-entitled section of the petition merely alludes to the record (5962, I, p. 599) and to 200 F. Supp. 149 (D. Mass., 1961) for the Findings of Fact and Conclusions of Law of the District Court. We have, accordingly, reproduced them as an appendix to this brief, preceded by the pleadings, including the motion for summary judgment upon which the District Court first considered the matter raised here by the Petitioner (5962, I, p. 29) and the District Court's disposition of that motion and of the Defendant's motion for reconsideration of the denial of the Defendant's motion for summary judgment (5962, III, pp. 735-739).

Comment on Jurisdiction

The "reach-back" jurisdiction of this Court, i.e., to reopen the basic question of liability decided by the Court of Appeals for the First Circuit in 1962 in Case No. 5962, is said to be based upon *Hamilton-Brown Shoe Co.* v. *Wolf Brothers,* 240 U.S. 251, 257-258 (1915) and *Toledo Scale Company* v. *Computing Scale Co.,* 261 U.S. 399, 418. It is at least questionable that those early decisions should continue to control the appellate machinery now set forth in 28 U.S.C. 1292(a)(1), 1254(1), and 2101(c). The mandatory language of 28 U.S.C. 2101(c) would appear to be basis for denying the petition on the ground that the Petitioner, having elected to exercise the prerogative of interlocutory appeal from the injunction, (28 U.S.C. 1292(a)(1)) and having failed to petition this Court from the affirmance of his liability in the appeal that disposed of the questions he seeks to review by this petition, is estopped by the decision of the Court of Appeals in Case No. 5962 as "the law of the case," *Roberts* v. *Cooper,* 20 How. 467, 481 (1857). However, the Respondent does not press the point because there is more substantial reason why certiorari should be denied.

Additional Statement of Fact

The Parties

Simmons Company is a Delaware corporation, organized in 1915. When organized, it succeeded to the business of The Simmons Manufacturing Company which was a Wisconsin corporation organized in 1884 under the name "Northwestern Wire Mattress Co.", and which had become, by change of name in 1899, "The Simmons Manufacturing Company". (Finding No. 2; 5962 I p. 599; Appendix, p. 47) Respondent is probably best known to the general public for its BEAUTYREST mattress and its HIDE-A-BED sofa, although it manufactures a wider range of furniture products. These have included, since the early 1930's, upholstered furniture for the living room, at first to accompany Simmons' upholstered dual-purpose furniture, and later as an independent line of upholstered furniture.

The Petitioner, Abraham Baker, was a retail furniture merchant in Lawrence, Massachusetts, starting about 1935. In about 1943, he began a re-upholstering venture, which he called "Simmonds Upholstering Company", as a side-door operation of "Baker Furniture Company", his retail establishment. The tail quickly wagged the dog and Simmonds Upholstering Company prospered (Finding 17, Appendix, p. 51). Baker Furniture Company disappeared.

The sordid details of *how* this venture prospered are set forth in Findings 16, 17, and 30 to 32 inclusive. The equally sordid details of how Petitioner sought to justify his adoption of the name "Simmonds" by a forged document and false testimony is detailed in Findings 24 to 29 inclusive, in Findings Nos. 35 and 36, and, as well, in Conclusions of Law Nos. 5 and 6. The findings of "likelihood of confusion" and actual confusion, and wilfull infringement, are Findings 21 to 23. These findings were entered on No-

vember 15, 1961, and the injunction to which the Court found the Respondent entitled in Conclusion 10 was entered on the following day, November 16, 1961.

The District Court's characterization of Mr. Baker as a "crook", (the third question presented by the petition) was made on March 23, 1964, some two and one-half years and two appeals later, and there is no suggestion that that conclusion was not drawn from the evidence in the case.

There were *four* defendants in the District Court. In addition to Mr. Baker personally, there were (a) Simmonds Upholstering Co., Inc., a Massachusetts corporation, the advertising, sales, and purchasing arm of the business, (b) New England Manufacturing Co., Inc., a Massachusetts corporation, the manufacturing arm of the business, and (c) Simmonds Sales System Inc., also a Massachusetts corporation, through which Mr. Baker sought to extend his business methods, by way of franchise of the name "Simmonds Upholstering Company", to other parts of the United States, viz., New York, New Jersey, Pennsylvania and Michigan. The latter was defunct, although suable under Massachusetts law, when the complaint (Appendix, pp. 15-26) initiating this action was filed on October 10, 1958.

Mr. Baker owned all of the stock of Simmonds Upholstering Co. Inc. and New England Upholstering Co. Inc., except for a few qualifying shares in each case held by members of his family (Finding 5, Appendix, p. 48). Those corporations were adjudicated bankrupt about a month after the Court of Appeals' mandate of August 8, 1962, affirming liability, in Appeal No. 5962. *In the matter of Simmonds Upholstering Co. Inc.,* In Bankruptcy No. 580-62 (D. Mass.); *In the Matter of New England Upholstering Co.,* In Bankruptcy No. 657-62 (D. Mass.).

Lower Courts' Consideration of the Questions Presented

The matter which the Petitioner seeks to raise in this Court was considered in the District Court at least three times. The first was on the defendants' motion for summary judgment (5962, I, p. 29, Appendix p. 39), briefed and argued before the District Court, and denied in the District Court's Memorandum of September 14, 1960 (5962, III, pp. 737-739, Appendix p. 44). This first disposition was promptly followed with a concession by the defendant, for the sake of argument, that the facts were as the plaintiff had contended on all issues, whereupon the District Court denied the motion for summary judgment as a matter of law, in the Memorandum of September 19, 1960 (5962, III, pp. 735-739; Appendix pp. 42-46). Then after a trial of fifty (50) days, during which the defendants tendered their evidence on the issue Petitioner seeks here to raise (only one of two alleged antitrust "defenses"), the Trial Court concluded that the defendants had failed to prove any violation of the antitrust laws (5962, I, p. 610, Conclusion 8, Appendix p. 58).

The legal question whether the antitrust law violation here charged could have been an absolute defense under Section 33(b)(7) of the Lanham Act, 15 U.S.C. § 1115(b)(7) was only decided in the District Court, if it was truly decided there at all, by the District Court's allowance of an amendment to the answer to set up the alleged antitrust violation as a defense (5962, I, pp. 26-29; Appendix p. 40). This was done largely on the strength of dictum in *Forstman Woolen Co.* v. *Murray Sices Corporation,* 10 F.R.D. 367 (S.D. N.Y., 1950) and this Court's reference, in *Timken Roller Bearing Co.* v. *U. S.,* 341 U.S. 593, 598 (1951) that Section 33(b)(7) of the Lanham Act "penalizes" use of a trademark to violate the anti-trust laws.

The question was again argued to the District Court on the motion for summary judgment but not decided because

the Court concluded instead that there were disputed issues of facts as to all defenses. Finally, when the defendants conceded the facts, the motion was denied as a matter of law, although the brief memorandum on the motion for reconsideration is not clear as to which legal issue was decided, i.e., whether the Court decided as a matter of law that there was no antitrust violation on the assumed facts, or that, even if there were a violation, it could not as a matter of law be the absolute defense for which the Petitioner had contended (5962, III, pp. 735-739).

The Conclusions of Law filed at the end of a trial are more informative in that they establish (Conclusion No. 8) that the defendants failed to carry their burden of proving an antitrust violation.

The Court of Appeals in its opinion (307 F. 2d 458, 468) likewise concluded that the facts did not amount to an antitrust violation because

> "We believe that in the instant case the motive actuating the requirement that an establishment displaying the Simmons sign possess all Simmons products is clearly within the exculpating principles outlined in *Dehydrating Process* and *Jerrold*, supra."

Even in so stating, the Court was less discriminating than the record, which had established that the "tying product", if that be the word, was the sign which read "Sleep Best On Beautyrest By Simmons", and the "tied product", if such it was, was not just *any* Simmons' mattress (there are many), but its premiere "BEAUTYREST".

The Court finally concluded that there was no basis for accepting the "per se" allegation advanced by the defendants (who had sought to classify the trademark registration as a Federally granted "monopoly", like the patent and copyright, in order to invoke the "per se" rule of *Inter-*

national Salt Co. v. *United States,* 332 U.S. 392 (1947) and *U. S.* v. *Paramount Pictures,* 334 U.S. 131, (1948)). It did, however, say, in its consideration of *Northern Pacific Railroad* vs. *United States,* 356 U.S. 1 (1958), that were it necessary to consider the apparently relaxed standard announced in *Northern Pacific,* it would have been necessary to return the case to the District Court for specific findings that the

> ". . . volume of commerce affected by the present arrangements should be regarded as substantial within the teaching of the above cited cases. * * * Similarly we would have to rule that Simmons' 20% of the mattress market in the United States gave them a sufficient economic power to impose an appreciable restraint on free competition in the tied product". (Footnote, p. 468)

The next-to-concluding paragraph of the opinion reads (p. 469):

> "In view of our determination that Simmons has engaged in no violation of the antitrust laws, it is unnecessary that we express any opinion on defendants' contention that an antitrust violation, if proven, would serve as an absolute defense to a trademark action under the Lanham Act."

Reasons for Denying Certiorari

1. Questions Nos. 1 and 2 of the petition are interdependent. Actually, a resolution of the alleged conflict between the First and Seventh Circuits is only the first step of three which would be necessary to reverse the judgment below. Neither the District Court nor the Court of Appeals got beyond the first step because each of them held, in the Respondent's favor, that there had been no violation of the antitrust laws.

The second step in invoking the Lanham Act as a "defense", if the language of Section 33 (b)(7) of the Lanham Act means anything, is to find that the mark in suit had been used "to violate the antitrust laws." The mark sued upon was "Simmons", Registrations Nos. 137,699, 532,319 and 548,280 (5962, IV, pp. 799-804). The alleged "tying product" was a slogan, separately registered as a certification mark, Registration No. 661,772 which read "Sleep Best On Beautyrest By Simmons" and was incorporated into a medallion certification sign (5962, II, p. 769) leased to the motel for display on its premises. The alleged "tied product" was not just any Simmons mattress, but rather the BEAUTYREST mattress. Thus, there is a further fact question which would have to be determined, viz., whether the mark "Simmons", covered by Registrations Nos. 137,699, 532,319 and 548,280, was used "to violate the antitrust laws", or whether, if there be violation, the mark so used was "Sleep Best On Beautyrest By Simmons".

The third step which would then require decision would be whether, if "Simmons" rather than "Sleep Best On Beautyrest By Simmons" were the instrumentality of the asserted violation, it should be a *complete defense* to this action, in contradiction of the very language of Section 33(b)(7) of the Lanham Act, which states that the penalty to be suffered is loss of an evidentiary advantage, viz., loss of a conclusive presumption of exclusive right to the mark arising out of the state of "incontestability" derived from five years of continuous use. Stated another way, the question is whether Respondent, who did not rely upon either the conclusive presumption of Section 33(b)(7), nor the *prima facie* presumption of Section 33 (a), but proved its superior right with evidence, should be penalized beyond what the statute prescribes and, in effect, stripped of its trademark in apparent contradiction of the "doctrine that

where a statute creates a new offense and denounces the penalty . . ., the punishment . . . can only be that which the statute prescribes." *D. R. Wilder Mfg. Co.* v. *Corn Products Refining Co.*, 236 U.S. 165, 174-175 (1915); *Bruces Juices* v. *American Can Co.*, 330 U.S. 743, 755 (1946).

As a corollary to this third step, it would be necessary that this Court also decide that Abraham Baker, who, so far as the record established, was neither mattress-maker nor mattress-seller, nor an operator of motels, nor, therefore, in a position to be injured by asserted malefactions of the Respondent which were alleged but not proved, should be *entitled* to invoke the antitrust laws.

Analogy to the patent misuse doctrine is not availing because a trademark right is not, like the patent or copyright, a "monopoly" or a right *in gross*, but rather a right appurtenant to a going business. "It does not confer a right to prohibit the use of the word or words. It is not a copyright. . . . A trademark only gives the right to prohibit the use of it so far as to protect the owner's good will against the sale of another's product as his." *Prestonettes* v. *Coty*, 264 U.S. 359, 368 (1923). "The owner of a trademark may not, like the proprietor of a patented invention, make a negative and merely prohibitive use of it as a monopoly. . . . In truth, a trademark confers no monopoly whatever in a proper sense, . . ." *United Drug Co.* v. *Rectanus*, 248 U.S. 90, 97-98 (1918). The public interest in the careful circumscription of even legal monopolies does not attach itself to trademarks as such, the public interest in trademarks being identifiable, if not concurrent, with that of the trademark owner, i.e., that the goods sold under the mark be those of the owner of the mark.

Since an antitrust violation, if proved, could not have harmed the Petitioner, there seems very little reason to create him a "very strange class of private attorneys gen-

eral" (*Kelly* v. *Kosuga,* 358 U. S. 516, 520 (1958)), on his own behalf, to preserve, and to enable him to resume, the way of business life detailed in the findings of the District Court referred to in the foregoing "Additional Statement of Fact."

2. As a further reason for denying certiorari, it is pointed out that multiple causes of action were pleaded and proved, viz., trademark infringement under the common law, unfair competition under the common law, and lastly, the infringement in commerce of the trademark rights protected by plaintiff's Federal registrations. (See Complaint, paragraphs 6 & 20, Appendix pp. 16, 24; Finding No. 1 and Conclusions of Law No. 4; 5962 I pp. 599, 610).

Section 33(b)(7) of the Lanham Act does not, by its terms, purport to touch the Respondent's common law rights in its name "Simmons" as a common law trademark, and it does not, by its terms, purport to attach itself to Respondent's right to be free of unlawful and unfair competition in the use of its trade name "Simmons", an infringement which the District Court found was as effective as it was deliberate and calculated.

Nor did the Act's sponsor, Congressman Lanham, see Section 33(b)(7) in that light (92 Congressional Record 7524; 1946):

> "One of the valuable new rights created by the Act is the incontestable right after five year's use of the mark and the corollary thereto that the certificate of registration is conclusive evidence of ownership and the right to the exclusive use of the mark. *This new and valuable right is denied to any trademark registrant who is shown to have used his mark to violate the antitrust laws, but this provision does not, and is not intended to deprive the registrant of any rights he would possess or enjoy if this Act were not enacted into law.* Stated in other terms, proof of violation of the antitrust laws

> of the United States by a registrant in the use of his mark does not under this Act destroy the validity of or the right of the registrant to continue to use the mark, but it places on him a burden of proof in the event of litigation which others do not have to carry, by diluting the weight the Court is to give to his certificate of registration as evidence of ownership and the right to use the mark. This is the intent and effect and the only intent and effect of the seven sub-paragraphs of paragraph b of Section 33." (Italics supplied)

Thus, even if all of the preliminary questions outlined in the preceding section of this argument should be decided favorably to Mr. Baker, and should amount, as he contends, to a "complete defense"* to the federal cause under the Lanham Act, there is no apparent basis upon which this Court could recognize Section 33(b)(7) of the Lanham Act as a defense to Respondent's rights in its own name under the common law. This Court has heretofore avoided making unavailing decisions involving the federal one of multiple grounds each capable of supporting the judgment (*Fox Film Corp.* v. *Muller*, 296 U.S. 207, 210 (1935)):

> ". . . the case is controlled by the settled rule that where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment."

It should not matter that the non-federal, common law causes were decided by a federal court under its diversity and pendant jurisdictions under 28 U.S.C. 1332(a) and 1338(b).

---

* Indeed, if Congress had intended that use of a trademark "to violate the antitrust laws" were to be an absolute defense to an infringement action brought under the Lanham Act, it would have been simple enough to have chosen more direct language for the purpose instead of setting it up merely as a proviso to the granting of an evidentiary advantage.

3. The last question presented by the petition is the invocation of this Court's supervisory power over the lower courts "to correct a wrong caused by the intemperate, prejudiced and unfounded attack on a litigant by the District Judge.", who ". . . termed petitioner a 'crook', seeking bankruptcy, who has admitted committing perjury before me and before the Registration Office in Washington***. The petitioner has not sought bankruptcy and the record is barren of any evidence that he admitted committing perjury before Judge McCarthy or before anyone else." (Petition, page 9).

The key word in the foregoing is "admitted". We must agree with the Petitioner's counsel that the Petitioner never "admitted" committing perjury. But the District Court did find (Findings 24 and 35, and Conclusion 5) that Baker had indeed testified in Superior Court of Rhode Island that he had bought his business from one "William B. Simmonds" and that he took a "bill of sale" (PX 37, 5962, IV 764) from the said "William B. Simmonds" to evidence the transaction. On the strength of this asserted longevity, the Superior Court of Rhode Island, at Mr. Baker's instance, enjoined one Abraham Adler from using the name "Simmons" (the pot calling the skillet black) (PX90, 5962, II 641-647).

He swore to that transaction in the Patent Office, too (Interrogatories 5962, IV, p. 813; Answers 5962, IV, p. 793).

He pleaded it in this lawsuit (Answer, paragraphs 19 and 32, Appendix pp. 31, 35), and in his deposition herein, he testified in detail about his transaction with "William B. Simmonds" (5962, I pp. 103, 104, 110, 111; III, pp. 140-145).

Respondent subsequently proved that "William B. Simmonds" was a non-existent person, his "Simmonds Upholstering Company" a non-existent enterprise, and that the "bill of sale" by which Mr. Baker "bought" it, was a "fake document" procured by Mr. Baker (307 F. 2d 458, 466; Footnote 4).

Webster's Second International Dictionary, p. 629, defines "crook" in a manner which suits these circumstances very well.

The utterance by the District Court was made on March 23, 1964, from his hospital bed* over the telephone (6383 I, p. 35-37) in the course of his ruling upon a motion of the petitioner's counsel to censure the Master for allegedly condoning a contempt by excusing a witness from the accounting hearing for one hour (6383 II, pp. 39-44; I, pp. 26-37).

One may wonder whether it is ever appropriate for a District Judge to speak of a litigant as a "crook" when it was not necessary to call a spade a spade. However, the statement was made two-and-one-half years after the liability determination which detailed the defendant's activities, and, no doubt, reflected the District Judge's ire at Baker's attempt to deceive the Court with spurious evidence. See Conclusion No. 5:

> "5. Defendants' fraudulently prepared Bill of Sale, which purported to give them a right to use the name 'Simmonds', was intended to be used, and was actually used by them as a means not only to deceive this Court, but also had been used successfully to deceiving another Court to believe that the Defendants had in fact succeeded to a pre-existing 'Simmonds Upholstering Company' and had lawful claim to the name. * * *"

Bias or prejudice such as to disqualify a judge or his official act must be personal in nature as distinguished from "a judicial predilection obtained from the hearing of a case." *Gallarelli* v. *United States*, 260 F. 2d 259, 261 (1 Cir., 1958) In terms most applicable to this case, the proposition was perhaps best stated in another First Circuit case some forty years ago, *Craven* v. *United States*, 22 F. 2d 605, 607-608 (1 Cir., 1927):

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* The District Judge died on April 6, 1964. The Master ultimately filed his report which was in due course confirmed by the Chief Judge of the District Court, who entered the judgment for the Respondent since affirmed by the Court of Appeals in Case No. 6383.

"At most, then, the affidavit charges a 'bias and prejudice', grounded on the evidence produced in open court at the first trial, and on nothing else. We hold that such bias and prejudice (if these be appropriate terms for a well-grounded state of mind, 255 U.S. 42, 41 S.Ct. 236, 65 L.Ed. 481) is not personal; that it is judicial. 'Personal' is in contrast with judicial; it characterizes an attitude of extra-judicial origin, derived non coram judice. 'Personal' characterizes clearly the prejudgment guarded against. It is the significant word of the statute. *It is the duty of a real judge to acquire views from evidence. The statute never contemplated crippling our courts by disqualifying a judge solely on the basis of a bias (or state of mind,* 255 U.S. 42, 41 S.Ct. 236, 65 L.Ed. 481) *against wrongdoers, civil or criminal, acquired from evidence presented in the course of judicial proceedings before him.* Any other construction would make the statute an intolerable obstruction to the efficient conduct of judicial proceedings, now none too speedy or effective." (Emphasis supplied)

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be denied.

Respectfully submitted,

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June 25, 1965

APPENDIX

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 58-1014-S
Unfair Competition
and
Trademark Infringement
Equitable Relief Sought

SIMMONS COMPANY,
Plaintiff
vs.
ABRAHAM (ABE) BAKER
541 Haverhill Street
Lawrence, Massachusetts, as an
individual and also d/b/a
SIMMONDS UPHOLSTERING COMPANY,

SIMMONDS UPHOLSTERING CO. INC.,
1 Chase Street, Arcadia Mill
Methuen, Massachusetts

SIMMONDS SALES SYSTEM, INC.,
1 Chase Street, Arcadia Mill
Methuen, Masachusetts
and
NEW ENGLAND UPHOLSTERING CO. INC.
1 Chase Street, Arcadia Mill
Methuen, Massachusetts,
Defendants

COMPLAINT

The Parties

1. Simmons Company, Plaintiff, is a corporation of the State of Delaware.

2. Defendant Abraham (Abe) Baker, whose correct legal

name is at present unknown to Plaintiff, is a citizen of the Commonwealth of Massachusetts.

3. Defendant Simmonds Upholstering Co., Inc., is a corporation of the Commonwealth of Massachusetts, and has its principal place of business at Methuen, Massachusetts.

4. Defendant Simmonds Sales System Inc., is a corporation of the Commonwealth of Massachusetts, and has its principal place of business at Methuen, Massachusetts.

5. Defendant New England Upholstering Co. is a corporation of the Commonwealth of Massachusetts, and has its principal place of business at Methuen, Massachusetts.

Jurisdiction

6. As to subject matter, as more fully appears hereinafter, Plaintiff seeks relief from unfair competition and trademark infringement by the Defendants. This Court has jurisdiction because:

(a) The matter involves infringement of rights granted to Plaintiff by the laws of the United States in respect of a trademark registered under said laws (28 U.S.C. 1338a);

(b) Defendants' unfair competition is related to Plaintiff's claim under the trademark laws of the United States (28 U.S.C. 1338b);

(c) Diversity of citizenship exists between Plaintiff and each of the Defendants, and the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs (28 U.S.C. 1338a, as amended by Act of July 25, 1958, Public Law 85-554, 72 Stat. 415).

7. As to venue, Plaintiff alleges that each of the Defendants resides in the District of Massachusetts.

Statement of Claim

8. (a) Plaintiff (which term as used hereinafter includes Simmons Company and its predecessors) was founded as a manufacturing concern at Kenosha, Wisconsin, in the

year 1870 by Zalmon G. Simmons. It was then a proprietary enterprise known as "Z. G. Simmons & Company". In 1876, Plaintiff commenced the manufacture of furniture with the introduction of a woven wire mattress, and thereafter conducted that portion of the business under the name "Northwestern Wire Mattress Company". In 1884, said Z. G. Simmons and others formed Northwestern Wire Mattress Company, a corporation of Wisconsin, which succeeded to the business of Z. G. Simmons personally under that name. In 1899, the Wisconsin corporation became, by change of name, "The Simmons Manufacturing Company". The present Plaintiff, Simmons Company, a Delaware corporation, was formed in 1915 and promptly acquired all of the business assets of The Simmons Manufacturing Company (Wisconsin).

(b) In the eighty-eight years of its existence, initially as a proprietorship, and subsequently as a corporation, Plaintiff has been controlled and managed by its founder, said Z. G. Simmons, and by succeeding generations of his family. Upon the death of Z. G. Simmons in 1910, his son Zalmon G. Simmons, Jr., became President of The Simmons Manufacturing Company, and then President of the present Plaintiff, Simmons Company, from 1915 until 1932. Grant G. Simmons, son of Zalmon G. Simmons, Jr., was President of Simmons Company from 1932 until 1957. Since 1957, Grant G. Simmons, Jr. has been, and now is President.

(c) Continuously since 1899, when the name of the business became "The Simmons Manufacturing Company", Plaintiff has used, and it is now using, the word "SIMMONS", the surname of the founder, as a trademark on substantially all of the merchandise which Plaintiff has manufactured and sold, or otherwise as a trade name, to identify merchandise sold by Plaintiff.

9. From its entry into the furniture manufacturing business in 1876, the range of furniture products manufactured

and sold by Plaintiff has expanded greatly and now includes bed springs, bedsteads, mattresses, daybeds, studio couches, cabinet beds, in-a-door beds, various kinds of beds convertible to other items of furniture, such as daybeds, lounges, sofa beds and the like; hospital beds and other institutional furniture including chairs, cabinets, drawers, chests, wardrobes, etc.; upholstered furniture of various types for various uses; and wood and metal furniture of many kinds.

10. From its beginning at Kenosha, Wisconsin, in 1870, Plaintiff developed a world-wide business in the sale of furniture, and related products under the name "SIMMONS". By 1910, Plaintiff had distribution centers in Chicago, New York City, Baltimore, St. Louis, St. Paul and San Francisco. By 1915, a coast-to-coast warehouse system had been established reaching most of the principal market areas of the United States, and was expanding. By 1920, Plaintiff had acquired additional manufacturing facilities in San Francisco, California, Atlanta, Georgia, and Newark, New Jersey, and has established a manufacturing plant and business, under the name "Simmons Ltd." in Canada. By 1930 Compania Simmons, S. A. (Mexico) had been formed by Plaintiff and was making and selling SIMMONS products in Mexico, and Simco Ltd., had been formed and was making and selling SIMMONS products in Great Britain. By 1940, manufacturing plants had been established by Plaintiff in Cuba, Puerto Rico and Argentina for making SIMMONS products.

11. Plaintiff's business now includes furniture and bedding manufacturing plants in various parts of the United States, namely: Atlanta, Georgia; Columbus, Ohio; Dallas, Texas; Elizabeth, New Jersey; Jacksonville, Florida; Kansas City, Kansas; Kenosha, Wisconsin; LaGrange, Illinois; Los Angeles, California; Medford, Massachusetts; Munster, Indiana; San Francisco, California; and Union,

New Jersey; and distribution centers at many other cities. Plaintiff's products are sold under the name SIMMONS in department and furniture stores throughout the United States, and in many foreign countries, including Canada, Mexico, Cuba, Venezuela, Argentina, and other Western Hemisphere countries, Great Britain, and other European countries; and Australia.

12. From the year 1917 to date, Plaintiff has advertised its products in periodicals of national circulation and of local circulation, including all of the New England States, and has expended many millions of dollars in so advertising its products under the name or trademark SIMMONS. As a result of said advertising and of the extensive use of said trademark on the merchandise manufactured and sold by Plaintiff, and of the high quality of the products on which said trademark has been used, the public throughout the United States, including all of the New England States, are well acquainted with Plaintiff's name, and have come to look upon merchandise advertised for sale under said trademark as merchandise of high quality, and as emanating from Plaintiff.

13. Plaintiff is the owner of the following United States trademark registrations, the trademark "SIMMONS" registered thereby, and the good will and business appurtenant thereto:

Registration No. 137,669, dated Nov. 30, 1920,
Renewed Nov. 30, 1940
Registration No. 532,319, dated Oct. 24, 1950
Registration No. 548,280, dated Sept. 18, 1951

14. By reason of the premises, Plaintiff has established the word "SIMMONS" as an asset of inestimable value in its business of manufacturing and selling furniture, and since adopting and commencing the use of the name or trademark SIMMONS, has been, and still is, the exclusive owner of said name or trademark as applied to merchandise

of the same general character as those to which Plaintiff has applied said name or trademark. Said exclusive ownership has been generally recognized in the trade and by dealers in furniture, and has been established in controversies against persons or concerns who used said name or trademark or simulations thereof on related merchandise without the consent of Plaintiff, and who, after protest or suit by Plaintiff, discontinued such use.

15. Plaintiff is informed and believes, and therefore alleges that:

(a) Before any of the unfair acts hereinafter set forth in Sub-Paragraphs b, c, d, e, and f, Defendant Baker knew that Plaintiff had spent large sums of money in developing, promoting and selling products under the name or mark SIMMONS, but nevertheless, with intent to unfairly compete with Plaintiff, Defendant Baker unfairly commenced the business of re-upholstering furniture under the names "Simmonds Upholstering Company" and "Simmonds Upholstering Company of New England" in the Commonwealth of Massachusetts and elsewhere in the United States, and has carried on and expanded said business while representing falsely to the public in the New England States, and elsewhere, that said business is a part, or affiliated with, the Plaintiff.

(b) By 1950, Defendant Baker, then operating as "Simmonds Upholstering Co.", had established sales branches in a number of the principal New England cities, including, to wit, Boston, Hartford, Lawrence, Lowell, Manchester, New Haven, Portland and Providence. To handle the expanding volume of business solicited by him under the name of "Simmonds Upholstering Co.", Defendant Baker formed the Defendant corporation "New England Upholstering Co.", all of the capital stock of which, with the exception of a few qualifying shares has been, and now is, owned by Defendant Baker, who controls the operation of said De-

fendant corporation. Defendant New England Uholstering Co., in a plant at Lawrence, Massachusetts, re-upholsters furniture for Defendant Baker, and for the other defendants, and has substantially no other accounts. Furniture re-upholstered by Defendant New England Upholstering Co., for the account of Defendant Baker and said other defendants, is labeled by it with the name "Simmonds", and returned by it or by them to the customers of Defendant Baker and said other defendants in the aforementioned New England cities and other places.

(c) In 1950, Defendant Baker formed Defendant corporation Simmonds Upholstering Co., Inc., and owned substantially all of the capital stock thereof. He is President of said corporation, the other offices of which are held respectively by his wife and his brother. Defendant Simmonds Upholstering Co., Inc., succeeded to the upholstering business formerly conducted by Defendant Baker personally under the name Simmonds Upholstering Co.

(d) In 1950, Defendant Baker, together with one Edward Williams and one Sidney Rubin, formed Defendant Simmonds Sales System, Inc., in which Defendant Baker holds the controlling interest. Said Defendant Simmonds Sales System, Inc., was organized for the purpose of selling re-upholstering service for the accounts of Defendant Simmonds Upholstering Co. Inc., and Defendant Baker, and to carry the operation of all of said Defendants throughout and beyond the New England area through a system of franchises or licenses, the details of which are at present unknown to Plaintiff, but which have served to extend the name "Simmons Upholstering Co." and its unfair operations beyond the New England States, viz., at various times, to New York City, Philadelphia, Pittsburgh, Detroit and Montreal, Canada.

(e) Said Defendant Baker, together with said individuals Sidney Rubin and Edward Williams, officers of the

Defendant Simmonds Sales System, Inc., in 1951 organized a corporation, Simmonds Upholstering Co. Inc., under the laws of the State of New York to extend to the State of New York the operations conducted in the New England area by said Defendants Baker, Simmonds Upholstering Co. (Mass.) and Simmonds Sales System, Inc. Said New York corporation granted franchises to various individuals who operate in and around the City of New York under the trade styles "Simmonds Upholstering Co. of Manhattan", "Simmonds Upholstering Co. of Brooklyn", and others at present unknown to Plaintiff.

(f) Said Defendant Baker promoted the formation of a corporation of Canada under the name Simmonds Upholstering Co. Ltd., with headquarters at Montreal, and Plaintiff is informed and believes that Defendant Baker owns a controlling interest in said Canadian corporation.

16. The business operations of said Defendant Baker, and said corporate defendants controlled by said Defendant Baker, and of the various business organizations licensed or franchised by him or them to operate under the name SIMMONDS, have created and fostered great confusion in the public mind between Plaintiff's name and the name SIMMONDS. The names SIMMONS and SIMMONDS are virtually identical, visually and phonetically, and the several defendants and their several licensees, by direct misrepresentation in the personal and word-of-mouth solicitation of business, and by innuendo in their newspaper, radio and television advertising, and by the labeling of the furniture re-upholstered by them, have sought to create, and have created, the impression in the minds of certain segments of the public that they are in fact a department of Plaintiff, or are affiliated with Plaintiff. As a result of said fraudulent misrepresentations of Defendants and their licensees, and as a result of their shoddy and unscrupulous treatment of their cus-

tomers, Plaintiff's good will and reputation with the purchasing public have suffered far in excess of $10,000.

17. For example, and without fully describing the character of misrepresentations made by Defendants and their licensees to fraudulently associate themselves with Plaintiff, their salesmen have on occasion stated to prospective customers that they are "a department of the Simmons Bedding Company". On other occasions, said salesmen, responding to inquiries from prospective customers as to whether they represented Plaintiff, replied evasively and in accordance with instructions from said Defendants, in order to confirm in their customers' minds the alleged association with Plaintiff suggested initially by Defendants' fraudulent use of the name "SIMMONDS". Defendants' advertising in media of local and interstate circulation, viz., newspapers, radio and television proclaims them "America's Oldest and Largest Upholsterer, in business since 1899". (Plaintiff is in fact one of the country's largest furniture manufacturers, and, as stated in said Registration No. 532,319 first used the name "SIMMONS" as a trademark in 1899). The re-upholstering service furnished by Defendants is supplied under the name "SIMMONDS", and is sold in commerce between the several New England states and elsewhere.

18. The business tactics of said Defendants Baker, Simmonds Upholstering Co., Inc. (Mass.), and Simmonds Sales System, Inc., insofar as their relations with general public are concerned, resulted in proceedings against them by the Federal Trade Commission and the entry in 1953, by consent, of a Cease and Desist Order against their fraudulent advertising of price, quality of materials, workmanship, and guarantee, and against their representation that "Simmonds Upholstering Co." was "America's oldest and largest re-upholsterer of furniture", or "was established

in 1899", which representations were admitted by said Defendant Baker, in said consent order, to be untrue.

19. Notwithstanding the foregoing, said Simmonds Upholstering Co., by its President, the said Defendant Abe Baker, filed an application in the United States Patent Office on or about June 6, 1956 for registration of the name SIMMONDS as a mark for the service of upholstering, reupholstering, restyling, recovering, repairing, and refinishing furniture, and said Defendant Baker, as President of Defendant Simmonds Upholstering Co., Inc. (Mass.), made oath that said name had been in use since 1899. Plaintiff opposed the granting of said registration, and, when Plaintiff had proceeded to present evidence of its superior and prior right in the name of SIMMONS in the bedding and furniture business, and to support its charge of fraud on the part of said Defendants Simmonds Upholstering Co., Inc. and Abe Baker, said Defendant Simmonds Upholstering Co., Inc., by its President Abe Baker, voluntarily confessed judgment in favor of Plaintiff by abandoning its application for registration.

20. Notwithstanding the Order of the Federal Trade Commission, and notwithstanding the confession of judgment in favor of Plaintiff in the trademark proceeding in the United States Patent Office, Defendants Abe Baker and Simmonds Upholstering Co., Inc., (Mass.) have continued the unfair and fraudulent misrepresentations and business practices hereinbefore complained of, which violate Plaintiff's rights in respect to said name or trademark SIMMONS under the common law and under said Federal trademark registrations, and which were enjoined by the Federal Trade Commission, and Plaintiff believes that said Defendants will continue said unfair, deceptive, fraudulent and misleading practices to Plaintiff's injury, unless enjoined by this Court.

DEMAND FOR JUDGMENT

22. WHEREFORE, Plaintiff prays:

A. That this Court order, adjudge, and declare:

1. That Plaintiff has the exclusive right to use the word "Simmons" (including any simulations thereof) as a trade name or trademark in connection with the manufacture, sale or repair of furniture;

2. That the Defendants and each of them have infringed upon the rights of Plaintiff by using the words Simmonds as a trade name or trademark in connection with the sale or the upholstering or re-upholstering of furniture;

3. That the United States Registrations Nos. 137,699, 532,319 and 548,280 are valid, and that Plaintiff is the exclusive owner thereof, and of all rights pertaining thereto;

4. That the Defendants, and each of them, have infringed upon the rights of Plaintiff in respect of said registrations.

B. That said Defendants, and each of them, their officers, agents, employees and attorneys, and all acting under or through them, be perpetually enjoined from:

1. making any further use of the word SIMMONDS, or any other name or mark confusingly similar to Plaintiff's name or trademark SIMMONS in connection with the business of selling, upholstering or re-upholstering, or otherwise servicing furniture;

2. representing in any way that said Defendants, or any of them, are part of, affiliated with, or in any way have the approval of the Plaintiff.

C. That said Defendants, and each of them, be ordered and directed:

1. to remove the name SIMMONDS from their

business and corporate names and from the names of any corporation or concern owned or controlled by them or any of them, and from any official registry in the Commonwealth of Massachusetts, or elsewhere where said names may appear;

2. to terminate forthwith all licenses or franchises granted by them and purporting to convey a right to use the name "Simmonds".

D. An accounting for profits and damages;

E. Reasonable attorney's fees;

F. The cost of this action; and

G. Such further or additional relief as the Court may deem just.

SIMMONS COMPANY,
Plaintiff
By (s) DONALD R. ANDERSON
Hill, Barlow, Goodale
& Adams
53 State Street
Boston, Massachusetts
Attorneys for Plaintiff

October 10, 1958
Boston, Massachusetts

Of Counsel:
(s) C. A. SOANS
(s) WM. E. ANDERSON
(s) FRANCIS A. EVEN
Soans, Anderson, Luedeka
& Fitch
135 S. LaSalle Street
Chicago 3, Illinois

Sept. 25, 1958
Chicago 3, Illinois

ANSWER TO COMPLAINT

Now comes the Defendant in the above entitled case and collectively answer the compaint in the above entitled action as follows:

1. The allegations of paragraph 1 of the complaint are admitted.

2. The allegation of paragraph 2 is admitted.

3. The allegation of paragraph 3 of the compaint is admitted.

4. The allegations of paragraph 4 of the complaint is denied. To the Defendant's best knowledge, Simmonds Sales System Inc. does not have a place of business in Methuen. Simmonds Sales System Inc. is a defunct organization, in fact and in law, and have been a defunct organization for many years.

5. The allegations of paragraph 5 are admitted.

6. The allegations of paragraph 6 are admitted only with respect to jurisdiction. Insofar as they imply any rights in the Plaintiff for infringement or unfair competition by the Defendants, they are denied.

7. The allegations in paragraph 7 are admitted.

8. Defendants have no present knowledge of the allegations of paragraph 8(a), (b) and (c) and therefore accordingly deny the same and hold the Plaintiff strictly to its proof.

9. Defendants do not have present knowledge of the allegations of paragraph 9 and accordingly deny the same and hold the Plaintiff strictly to its proof. It is specifically denied however, that the list of goods set forth in paragraph 9 of the complaint have been manufactured by the Plaintiff from 1876 and that all of these items have been made since a time prior to the founding of the Defendants respective businesses.

10. Defendants do not have present knowledge of the

allegations of paragraph 10 and therefore deny such allegations, and hold the Plaintiff strictly to its proof.

11. Defendants do not have present knowledge of the allegations of paragraph 11 of the complaint and therefore deny such allegations and hold the Plaintiff strictly to its proof. If Plaintiff does sell products under the name Simmons, such sales take place only in department and furniture stores in a manner which is completely distinctive of and not subject to the liklihood of confusion with the Defendant's operations which do not involve the selling of products. Defendants do not and have never sold furniture and or bedding.

12. The allegations of paragraph 12 are at present unknown to the Defendants and accordingly, they are denied. Plaintiff is held strictly to its proof in its allegations of this paragraph.

13. Defendants admit the issuance of registrations set forth in paragraph 13 of the complaint, but have no knowledge as to whether or not Plaintiff is the present owner of the registrations at this time, and accordingly hold the Plaintiff strictly to its proof in this allegation.

14. Defendant denies the allegations in paragraph 14.

15. (a)Defendant denies the allegations of paragraph 15(a) of the complaint.

(b) Defendants deny the allegations of paragraph 15(b) except as hereinafter specifically admitted.

Defendant Baker did at one time do business as Simmonds Upholstering Co., having sales branches in several cities.

Defendant Baker, however, no longer and has for a long time not done business as an individual. Simmonds Upholstering Co., as a proprietorship is a defunct organization. Simmonds Upholstering Co., Inc. and New England Upholstering Co., Inc. are distinct and separate corporations in which Defendant Baker has stock interests. Sim-

monds Upholstering Co., Inc. has enjoyed a substantial expanding volume of business. Defendant New England Upholstering Co., Inc. does not reupholster furniture for defendant Baker. New England Upholstering Co., Inc. reupholsters furniture for Simmonds Upholstering Co., Inc. and other corporations. Defendants deny they use the names Simmonds on labels as a trademark associated with goods.

(c) The allegations of paragraph 15 (c) are admitted, except insofar as they imply that Defendant Baker alone formed Defendant corporation Simmonds Upholstering Co., Inc.

(d) The allegations of paragraph 15 (d) are specifically denied except as hereinafter specifically admitted.

Defendant Baker, Edward Williams and Sidney Rubin in or about 1950 did form defendant Simmonds Sales System Inc.

Defendant Baker did not have a controlling interest.

Simmonds Sales System Inc. did not operate in Canada.

Simmonds Sales System Inc. had franchise agreements with individual manufacturers to provide reupholstering services on a local scale in various areas. The franchise arrangements of Simmonds Sales System Inc. was thereafter discontinued and all franchise operations ceased. The Simmonds Sales System Inc. then became a defunct corporation.

(e) The allegations of paragraph 15 (e) are specifically denied except as hereafter specifically admitted. A corporation, Simmonds Upholstering Co., Inc. was organized under the laws of the State of New York and had franchise agreements with various individuals operating in the New York area. This corporation is presently defunct and franchise agreements no longer are in operation.

(f) Defendants admit the existence of a corporation of Canada under the name Simmons Upholstering Co. Ltd.,

but specifically deny that Defendant Baker owns the controlling interest in said Canadian corporation and specifically deny any relevance of the said Simmonds Upholstering Co., Ltd. with matters otherwise pleaded by the Plaintiff.

16. Defendant denies the allegations of paragraph 16. More specifically and not by way of limitation of the general denial of paragraphs 16, the Defendants deny any implication that they sell products or goods in the nature of furniture bearing a label marked Simmonds. Defendants deny that the work performed in the course of services rendered is shoddy and that the treatment of their customers is unscrupulous. Defendants, and in particular, Simmonds Upholstering Co., Inc. are on excellent terms with their customers and have enjoyed a substantial portion of the business being in repeat business with former satisfied customers.

17. Defendants deny the allegations of paragraph 17 in the Plaintiffs complaint, except insofar as it is admitted that Defendants Simmonds Upholstering Co., Inc. renders a reupholstering service in commerce under the name Simmonds Upholstering Co., Inc.

18. Defendants deny the allegations of paragraph 18 except as hereinafter specifically admitted and stated.

Defendant Simmonds Upholstering Co., Inc. (Mass.) was not involved in any proceeding with the Federal Trade Commission. It is admitted that an order was entered by consent with the Federal Trade Commission that certain actions should not be taken by Simmonds Sales System Inc. and Defendant Baker. However, Defendants did not admit and still do not admit any malfeasance, misfeasance and or nonfeasance on their part, which resulted either in the entry of the order or the origination of the proceedings by the Federal Trade Commission. A consent order was agreed upon as a matter of convenience, since the parties therein

involved were, in fact, acting properly and not in a manner which varied from the proposed order by any material degree. That since the provisions of the order were in accordance with good business practice, the parties therein involved were desirous of acting in accordance with such order whether or not it was entered, and accordingly, the entry of such an order was not considered to adversely affect or change the operation of the parties therein involved.

19. The allegations of paragraph 19 are denied except as specifically herein admitted. Defendant Simmonds Upholstering Co., Inc. filed an application in the United States Patent Office on or about June 6, 1956 for registration of the service mark Simmonds for service of reupholstering, restyling, recovering, repairing and refinishing furniture. The said Defendant Baker as president, made an oath that the name had been in use since 1899, which in fact it had, by the Defendant Simmonds Upholstering Co., Inc.'s predecessor in business, notwithstanding any agreements or understandings or orders involving the Federal Trade Commission. The Plaintiff did oppose the granting of the registration. The Defendant Simmonds Upholstering Co., Inc., only as a matter of expediency, voluntarily agreed to abandon the application. It is specifically denied the Plaintiff has any prior or superior rights in the name Simmons in the bedding and furniture business which preempts the Defendant's rights to the mark Simmonds for the aforementioned services. Moreover, Defendants specifically deny any fraud malfeasance, nonfeasance and misfeasance on their behalf in connection with their activities. The application for registration of the service mark "Simmonds" was made in good faith, with the knowledge and belief that the Defendants Simmonds Upholstering Co., Inc. had acquired a valid unassailable and superior right in the mark Simmonds for the services therein claimed, and that the mark "Simmonds" had acquired a significance when used

in conjunction with the Defendant's corporate name Simmonds Upholstering Co., Inc. and that Defendant Simmonds Upholstering Co., Inc. was merely trying to consolidate the rights which it long previously acquired, with such rights having been previously by implication and positive action of the Plaintiff long been recognized.

20. The plaintiffs allegations in paragraph 20 of the complaint are denied by the defendants.

Further and affirmatively answering the defendants state:

21. Abe Baker does not now and has not for a long time in the past, done business as Simmonds Upholstering Company, nor does Abe Baker in any way engage in the re-upholstering or upholstering business as an individual. Defendant Baker's sole interest in connection with the named Defendant's is as an officer and stockholder.

22. Simmonds Sales System, Inc. and Simmonds Upholstering Company are defunct in operation and have been for a long time in the past. New England Upholstering Co., Inc. does not and has not used the word "Simmonds" as a trade mark or service mark.

23. Defendants deny that the word "Simmonds" which the Plaintiff claims as a trademark has become and/or has remained distinctive of the Plaintiff's goods; that the mark is primarily merely a surname in common usage and incapable of acquiring trademark significance.

24. Defendants deny that the use by them individually or collectively, of the word "Simmonds" either alone or in combination with the words "Upholstering Co., Inc." as a corporate name when applied to the aforementioned services is likely to cause confusion and mistake in the minds of the public and to deceive purchases as to the source of origin thereof. To the contrary, defendants believe and therefor aver that the cumulative dissimiliarities of both the mark or word, the manner of their use, and the goods of the Plaintiff and the services of the Defendants are suf-

ficient to avoid likelihood of confusion or confusion. The Defendants neither sell nor manufacture goods such as claimed by the Plaintiff as goods that it manufactures. The words "Simmonds Upholstering Co., Inc." used by the Defendants do not resemble the Plaintiffs claimed and alleged trademark "Simmons" when applied to the services of the Defendants, to be likely to cause confusion or mistake as to the source of origin.

25. The word "Simmons" or variations thereof has been so widely used in connection with various goods and services by others that the Plaintiff cannot now claim an exclusive or an all encompassing right to the word, and/or, alternately cannot extend his claim of right to the word "Simmons" if there is such a right, so broadly as to encompass the operation of the Defendants under the name Simmonds or Simmonds Upholstering Co., Inc. and the Plaintiff is consequently strictly limited in its rights in the mark "Simmons" to the specific furniture which the Plaintiff has in the past manufactured, and not to services such as rendered by the Defendants under the name Simmonds or Simmonds Upholstering Co., Inc.

26. Defendants believe and therefore aver the Plaintiff cannot rightfully contend that it is entitled to preempt the trade of reupholstering and upholstering services with respect to marks having "Simmonds" as a portion thereof and thus exclude others including the Defendants from the use of such marks. Defendants believe that this is especially true in these proceedings since the alleged mark of the Plaintiffs, "Simmons" cannot be described as an original, fanciful, unusual, arbitrary or strong mark as it merely signifies a surname.

27. As a complete defense, the Plaintiff is estopped to brink these proceedings by reason of the fact that it became fully aware of the activities of the Defendants and their predecessors or associated companies and their use

of the word "Simmonds" at least as early as 1950 but nonetheless, had never taken any steps to have such use enjoined or otherwise prevent confusion which the Plantiff alleges is caused by such use of the word "Simmonds" by the Defendants. Such inaction amounts to laches creating an estoppel.

28. As a complete defense the Plaintiff is estopped to bring these proceedings by reason of the fact that the Plaintiff in bad faith, enticed and induced the Defendant to substantially expand their operation and business, and allowed the Defendants to expend many hundreds of thousands of doflars in advertising and in the policing of its name Simmonds Upholstering Co., Inc. until the Defendants had built up a substantial good will at least in the local area of New England in a manner amounting to aquiescence creating an estoppel.

29. Defendants deny that the Plaintiff has ever used the words "Simmons" as a service mark and that with respect to the use of the mark "Simmons" as a trademark the Plaintiff has long since abandoned such mark for the Plaintiff no longer uses the mark "Simmons" in a trademark sense, but merely as a company name. The Defendants further allege that the Plaintiff no longer uses the mark "Simmons" as such but in conjunction in various ways with other words, as for example, the word "BEAUTYREST", and that therefore, the Plaintiff's mark is no longer "Simmons", but "BEAUTYREST" by "Simmons" or "Simmons Beautyrest" or some similar arrangement.

30. The Defendants further allege that they had not used the mark "Simmons" except in conjunction with and always associated with the words "Simmonds Upholstering Co., Inc." and that by virtue of this use, and by virtue of the distinctive use of the mark "Simmons" by the Plaintiff, there is no dilution of the Plaintiff's rights nor likelihood

of confusion between the products of the Plaintiff and the services rendered by the Defendants.

31. The Plaintiffs' have lost whatever rights they may have had to the mark "Simmons" by virtue of their indiscriminate allowance of the use of the word "Simmons" by others not associated with or controlled by the Plaintiff.

32. The Defendants and their predecessors have used the mark "Simmonds" in connection with services from a time prior to the Plaintiff's use of the mark "Simmons" for furniture or the like and consequently Defendant has superior rights in the mark "Simmonds" to any rights the Plaintiff may have.

WHEREFORE, Defendants pray that this action be dismissed with costs and reasonable attorneys fees and such further or additional relief as the court may deem just.

SIMMONDS UPHOLSTERING COMPANY
(s) DAVID WOLF
December 1, 1958 By Ezekiel Wolf, Wolf & Greenfield
SIMMONDS UPHOLSTERING COMPANY INC.
December 1, 1958 By (s) Same
NEW ENGLAND UPHOLSTERING CO., INC.
December 1, 1958 By (s) Same

MOTION TO AMEND DEFENDANTS ANSWER

Now comes the Defendant, Abraham Baker and moves that the answer to the complaint be amended by adding the following paragraph:

"Defendant Abraham Baker does not now and has not for more than six years prior to the filing of the Complaint, been engaged in business as a proprietorship under the name Simmonds Upholstering Company; nor has Abraham Baker, other than as an officer or employee, of a corporate

entity, or as a stockholder in a corporate entity, had any connection with the utilization of the name "Simmonds" in the furniture reupholstering field or in other allied or similar fields."

Respectfully submitted,
ABRAHAM BAKER, d/b/a Simmonds Upholstering Co., Inc. et al
By (s) DAVID WOLF

Sept. 15, 1959

MOTION TO AMEND ANSWER

Defendants move the court for leave to amend the answer by inserting paragraphs 33-41 in the attached AMENDMENTS TO ANSWER after paragraph 32 of the answer.

Respectfully submitted,
EZEKIEL WOLF, WOLF & GREENFIELD
By (s) DAVID WOLF

AMENDMENTS TO ANSWER

33. Section 33b (7) of the Trademark Act of 1946, 15 U.S.C. 1115b (7), bars the plaintiff from the requested relief because the mark whose use is charged as an infringement has been or is being used to violate the antitrust laws of the United States.

The plaintiff registered a certification service mark in the Patent Office which it has used and is using improperly because a license to use said mark is tied to a condition that the licensee use only mattresses manufactured and sold by the plaintiff. The alleged "inspection services" rendered by the plaintiff in connection with said mark are merely a sham.

34. On June 9, 1955, plaintiff applied for registration of a certification service mark SLEEP BEST ON BEAUTYREST BY SIMMONS, allegedly to indicate that the establishment

which displays said mark has been inspected by plaintiff and that it maintains plaintiff's standards with respect to equipment maintenance and operation of services in providing lodging in hotels, motels and tourist courts. In a letter dated January 19, 1956 from the Patent Office, registration was refused for a number of reasons, one being that the mark, as applied to the alleged services, so resembled the mark SIMMONS, Registration No. 532,319 that confusion, mistake or disception would be caused by such registration. The latter reason for rejection was overcome in a letter dated July 9, 1956 in which the plaintiff amended the application to claim ownership of Registration No. 532,319 for the mark SIMMONS. The plaintiff acknowledged that a license to use the mark SLEEP BEST ON BEAUTYREST BY SIMMONS was tied to a condition that the licensee equip all beds for guests with mattresses sold by the plaintiff to the exclusion of mattresses sold by competitors.

35. In a Patent Office letter dated October 12, 1956 registration was again refused with the Examiner stating:

> The principle purpose of the agreement is to sell products manufactured by the applicant. The entire agreement is directed to the sale of products . . . it is the opinion of the Examiner that the "inspection" service is merely incidental to the applicant's promotion of the sale of its products and is not a service rendered apart from the sale of the products.

36. In fact, the alleged "inspection" service consists primarily of a simple return card from the licensee certifying that the circumstances described in the original application filed by the licensee continue to hold true and stating the progress of the licensee under its committments to become a hundred per cent equipped with "Beautyrest" mattresses sold by plaintiff to the exclusion of mattresses sold by competitors of the plaintiff.

37. Roadside signs bearing the mark SLEEP BEST ON

BEAUTYREST BY SIMMONS were leased to licensees on condition that licensees equip all beds for guests with "Beautyrest" mattresses sold by the Plaintiff to the exclusion of mattresses sold by competitors. This condition is a tying clause prohibited by Section 3 of the Clayton Act, 15 U.S.C. § 14.

38. In order to overcome the rejection of the Patent Office, the Plaintiff fraudulently argued that the reason for its seeking registration was only to protect the good-will of its business, as well as the sleep and comfort of the traveling public. In fact, the purpose of obtaining said registration and negotiating license agreements thereunder was to increase the sales of the Plaintiff's mattresses to motel owners to the exclusion of sales of competing mattresses.

39. The market for motel mattresses is a separate market from the market for mattresses used in households because price, quality and distribution channels are different. Plaintiff is the largest seller of motel mattresses in the United States.

40. Plaintiff is misusing the mark SLEEP BEST ON BEAUTYREST BY SIMMONS in an attempt to monopolize and has made agreements and conspired with others in an attempt to monopolize the motel mattress market in violation of Sections 1-3 of the Sherman Act, 15 U.S.C. §§ 1-3.

41. Plaintiff comes into equity with unclean hands because it uses and has obtained a registration of a mark including the name SIMMONS in a manner prohibited by the Lanham Act and the antitrust laws.

Respectfully submitted,
EZEKIEL WOLF, WOLF &
GREENFIELD
By (s) DAVID WOLF
Attorneys for Defendants

MOTION FOR SUMMARY JUDGEMENT

The defendants respectively move the Court to grant summary judgement on their behalf because facts not in dispute establish that as a matter of law:

a. The plaintiff is barred from maintaining an infringement suit because it has been and is using the mark SIMMONS to violate the antitrust laws of the United States.

b. The plaintiff comes into equity with unclean hands because it obtained a registration of a mark related to the one in suit on the basis of misleading and false statements made to the Patent Office.

c. The plaintiff is estopped from preventing the defendants from using SIMMONDS OR SIMMONDS UPHOLSTERING COMPANY because the plaintiff delayed bringing suit for more than seven years after learning of SIMMONDS UPHOLSTERING COMPANY with its sole excuse being that it thought defendants would collapse and go out of business while defendant SIMMONDS UPHOLSTERING COMPANY has spent much time and money in promoting its name by extensive advertising so that its annual business multiplied considerably during the period of the inaction by plaintiff.

Respectfully submitted,
HALE AND DORR
By (s) C. K. HURLEY
EZEKIEL WOLF, WOLF & GREENFIELD
By (s) DAVID WOLF
Attorneys for Defendants

DEFENDANTS' MOTION TO AMEND ANSWER.

Now come defendants in the above entitled case and move for leave to further amend their answer by adding thereto the following paragraphs:

42. The mark defendants are charged with infringing has been or is being further used by plaintiff to violate the anti trust laws of the United States, to wit, Subsection (d) of Section 2 of the Clayton Act as amended (Title 15 U.S.C. Section 13).

43. The conduct of plaintiff constituting said violation is as follows:

(a) In the course and conduct of its business in commerce, during the years 1959 and 1960, plaintiff paid or contracted for the payment of something of value to or for the benefit of its customers as compensation or in consideration for services or facilities furnished by or through such customers in connection with their offering for sale or sale of products sold to me by said plaintiff and such payments were not made available on proportionally equal terms to all customers competing in the sale and distribution of products purchased from plaintiff. For example, since January 1, 1959, plaintiff has been using the Simmons Co-operative Advertising Plan, also known as SCAP, the terms of which are tailored to exclude all but respondent's larger customers.

(b) As an example of this plan, during the year 1959, plaintiff contracted to pay, and did pay, to John Wanamaker and to Lit Bros., both of Philadelphia, Pennsylvania, amounts exceeding $2,400 and $4,000, respectively, as compensation or as allowances for advertising or other services or facilities furnished by or through said John Wanamaker and Lit Bros., in connection with their offering for

sale or sale of products sold to them by plaintiff. Such compensation or allowances were not offered or otherwise made available on proportionally equal terms to all other customers competing with John Wanamaker and Lit Bros. in the sale and distribution of products purchased from plaintiff.

(c) Plaintiff has similarly favored other large customers in Boston, Philadelphia and in other cities over competing customers in such cities.

44. By virtue of said violation plaintiff is barred under Section 33b (7) of the Trademark Act of 1946, 15 U.S.C. Section 1115b (7), from the relief requested in this suit, and is further barred from obtaining said relief by virtue of coming into equity with unclean hands.

By their attorneys,

(s) C. KEEFE HURLEY

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

SIMMONS COMPANY, *Plaintiff* v. ABRAHAM (ABE) BAKER, as an individual and also d/b/a SIMMONDS UPHOLSTERING COMPANY SIMMONDS UPHOLSTERING CO., INC. SIMMONDS SALES SYSTEM, INC. AND NEW ENGLAND UPHOLSTERING CO., INC., *Defendants.*	Civil Action No. 58-1014-S

MOTION FOR RECONSIDERATION OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Now comes the defendants in the above-captioned civil action and respectfully move that the Court reconsider its decision of September 14, 1960 denying defendants' motion for summary judgment.

REASONS

The court bases its decision on a finding that there are facts in issue, stating in its memorandum of September 14, 1960 what those issues are. We have underlined in red in the attached copy of the memorandum those facts which the court states are in issue.

For the purposes of the defendants' motion for summary judgment, the defendants accept as true the plaintiff's allegations on those facts underlined in red. With

respect to any factual matter not mentioned in the court's memorandum, defendants will accept plaintiff's allegations of fact stated in its complaint or in any papers on file with the Court as being true for the purposes of their motion for summary judgment.

Since the defendants are willing to admit for purposes of this motion all the allegations of fact heretofore made by the plaintiff, there cannot be factual issues in dispute.

On such a record defendants are entitled to judgment as a matter of law. *Morton Salt Co.* v. *G. S. Suppiger Co.*, 314 U.S. 489 (1942); *Park-In Theatres* v. *Paramount-Richards Theatres*, 90 F. Supp. 730 (D. Del.), *aff'd*, 185 F2d 407 (3d Cir. 1950); *cert. denied*, 341 U.S. 950 (1951), *Dixon* v. *American Telephone & Telegraph Co.*, 159 F2d 863 (2d Cir.), *cert. denied*, 332 U.S. 764 (1947).

s/ C. Keefe Hurley
C. Keefe Hurley
Hale and Dorr
David Wolf
Charles Hieken
Ezekiel Wolf, Wolf & Greenfield

CERTIFICATE OF SERVICE

I, David Wolf, one of the attorneys for the defendants in the above entitled action, hereby certify that I have served copies of the above Motion for Reconsideration of Defendant's Motion for Summary Judgment by delivering in hand to Donald R. Anderson, Esq., Hill, Barlow, Goodale & Adams, 53 State Street, Boston, Massachusetts, and by mailing postage prepaid to Francis A. Even, Esq., Soans, Anderson, Luedeka & Fitch, 135 South LaSalle Street, Chicago 3, Illinois, counsel of record for the plaintiff, this sixteenth day of September, 1960.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION
NO. 58-1014-S

SIMMONS COMPANY

v.

ABE BAKER, ET AL

MEMORANDUM ON MOTION

September 14, 1960

McCarthy, D.J. (Retired, sitting by designation)

In this action for alleged infringement of a trademark owned by the plaintiff, the defendants have moved for summary judgment on three distinct bases: 1. That the plaintiff has used its trademark in violation of the anti-trust laws; 2. That the plaintiff does not have clean hands; and 3. That the plaintiff has been guilty of laches. After hearing and deliberation, the motion must be denied because material facts are in dispute as to each of the grounds raised by the motion.

1. The acts allegedly committed by the plaintiff in use of its trademark which give rise to the charge of alleged violation of the anti-trust laws are in dispute. The defendant alleges that the plaintiff used the embodiment of its trademark in a sign as a "tying" article and that plaintiff's mattresses were the "tied" article. Defendant further alleges that this "tying" resulted in violations of the Sherman and Clayton Acts. Plaintiff alleges that there was no "tying" in the monopolistic sense, offering evidence that any persons who leased the "tying" article and

agreed to purchase of the "tied" article were free to withdraw at any time. There is no undisputed fact which gives rise to a basis for finding, at this time, that plaintiff has been guilty of violation of the anti-trust laws.

2. The basis of plaintiff's unclean hands lies in allegedly false statements made by the plaintiff to the United States Patent Office in connection with plaintiff's application for a trademark upon a symbol which incorporates the mark which is the subject of this suit. The defendant's theory, apparently, is that the plaintiff stated to the Patent Office under oath that the mark sought to be registered was something more than a mere incident or aid to the sale of mattresses and that this was false. Evidence of the falsity supposedly comes from the same evidence which gives rise to the charge of anti-trust violation. This evidence is in dispute.

3. The charge of plaintiff's laches arises from plaintiff's admission that it knew of the existence of defendant for about seven years before it instituted this suit. In opposition to this ground for summary judgment plaintiff has offered voluminous proof of alleged fraud on the part of defendant. This gives rise to a factual dispute which causes denial of the motion for summary judgment on this ground also.

At hearing on the motion for summary judgment the defendant filed a motion to expunge certain portions of the plaintiff's brief and to expunge an affidavit made and filed by plaintiff's trial counsel. In light of what has been ruled above, the motions are denied.

Without reducing the matter to a formal motion, defendant, on argument, suggested to the court the possibility that this case might be certified for interlocutory review by the Court of Appeals if I should deny the motion. I have considered doing just this but have decided against it since I do not believe that this case is ripe for

interlocutory review within the terms of section 1292 of Title 28 of the United States Code.

The case will stand for trial. Of course, nothing herein will bar defendant from raising the same defenses to this action during the course of the trial by presenting evidence and making appropriate motions.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION
NO. 58-1014-S

SIMMONS COMPANY

v.

ABRAHAM BAKER, ET AL

MEMORANDUM ON MOTION

September 19, 1960

McCarthy, D. J. (Retired, sitting by designation)

The defendants have filed a motion seeking reconsideration of the ruling of the court on defendant's motion for summary judgment. Defendants in their latest motion state that they accept the plaintiff's allegations of fact for the purpose of this motion. In this case the motion for summary judgment is denied as matter of law, since, on examination of the entire record, I can find no grounds for allowing the motion.

S/ McCarthy J.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

November 15, 1961

FINDINGS OF FACT

A. THE SUIT

1. This is an action for infringement of federally protected trademarks, for infringement of trademarks protected by the common law, and for unfair competition. The important defenses relied upon were laches and the doctrine of unclean hands, the unclean hands allegedly arising from violations of the provisions of the Lanham Act by the plaintiff corporation in that the plaintiff corporation allegedly used its registered trademarks in attempted monopolization in violation of the anti-trust laws and in that the plaintiff corporation attempted to monopolize the motel mattress trade in violation of the anti-trust laws, and further, that the plaintiff corporation's SCAP program constituted a violation of the provisions of the Robinson-Patman Act.

After an extensive trial, which covered fifty days in all, at which parties litigant were represented by most competent and courteous counsel, briefs were prepared and the merits argued.

B. THE PARTIES AND THEIR ORIGINS

2. Plaintiff originally was founded as a manufacturing concern in Wisconsin before 1884 by G. Simmons under the name "Northwestern Wire Mattress Company" and commenced the manufacture of woven wire mattresses. In 1884 the "Northwestern Wire Mattress Company", a corporation of Wisconsin, was formed to succeed to the business of Z. G. Simmons. In 1899 the Wisconsin corporation. "The Simmons Manufacturing Company", succeeded to the business. In 1913 the plaintiff "Simmons Company" was organized as a Delaware corporation to succeed to the busi-

ness and assets of "The Simmons Manufacturing Company".

3. The management of Plaintiff and its predecessor companies has always been in the family of the founder Z. G. Simmons, each president has had the surname "Simmons". The president of the company is a great grandson of the founder.

4. Since 1899, when the name of the business became "The Simmons Manufacturing Company", Plaintiff and its predecessor have used the name "SIMMONS" as a trademark on substantially all of the goods which Plaintiff has manufactured, also as a trade name, to identify goods sold by Plaintiff.

5. Defendant Abraham Baker is a Massachusetts citizen. He does business as "Simmonds Upholstering Company". He is the owner of the corporate Defendants Simmonds Upholstering Company, Inc., and New England Upholstering Company, Inc., and always owned the controlling shares of the defendant Simmonds Sales System, Inc. All corporate Defendants were organized under the laws of the Commonwealth of Massachusetts.

6. Defendant Simmonds Upholstering Co., Inc., was organized in 1950, and about 1952 it became the sales branch of the furniture business conducted by the Defendant Abe Baker. It sells upholstered furniture and re-upholstering service to the public in the New England States, New York and formerly in Pennsylvania. Defendant Simmonds Upholstering Co., Inc., also purchases and owns the upholstery fabrics used in the manufacturing process by Defendant New England Upholstering Company.

7. Defendant New England Upholstering Company was organized in 1946. It was and is the manufacturing arm of Abraham Baker, doing business as Simmonds Upholstering Company, and since 1952 has performed the same function for Defendant Simmonds Upholstering Co., Inc.

8. Abraham Baker, doing business as Simmonds Upholstering Company, concerns itself chiefly with the salvaging of furniture taken from customers of Simmonds Manufacturing Co., Inc., and the salvaging of waste materials from the manufacturing operation.

9. Defendant Simmonds Sales System is now dissolved but it was still a corporation for purposes of suit against it at the time this action was brought. It was organized in 1950 by Abraham Baker to expand the business through a system of franchises which were granted to established upholsterers and re-upholsterers in New York, New Jersey, Pennsylvania, and Michigan and which gave the franchise holders the right of defendants to use the name "Simmonds", together with methods, know how and other services of defendants.

C. GENERAL DESCRIPTION OF THE BUSINESS ACTIVITIES OF PARTIES TO THIS ACTION

10. Plaintiff manufactures furniture including bedding products, living room furniture convertible into beds, various types of upholstered furniture for institutions which include private schools and colleges, hotels, and motels, and upholstered living room furniture of a non-convertible nature since 1958, all of which are sold under the name "Simmons" throughout the United States.

11. Furniture manufactured by Plaintiff includes bed springs, bed steads, mattresses, cabinet beds, and in-a-door beds; various kinds of upholstered furniture convertible to beds, such as day beds, lounges, sofa beds, and the like; hospital beds and other institutional furniture including chairs, cabinets, dressers, chests, wardrobes, etc.; upholstered furniture of various types for general use; and wood and metal furniture of many kinds.

12. Plaintiff has thirteen manufacturing plants located throughout the United States from East to West, including

one at Medford, Massachusetts, and three in other Eastern coastal states. It has sixty-six distribution warehouses. Plaintiff does, and has done for many years, a substantial volume of wholesale business in furniture and bedding nationally and in the New England area.

13. Plaintiff has spent great sums in advertising its products and in establishing the name SIMMONS in the mind of the public. In the last twenty years, it has spent an average of two million dollars per year for advertising. Most of this expenditure was for advertising in magazines of national circulation, and in all such advertisements, the Plaintiff's name "Simmons" was prominently displayed.

14. Plaintiff's name and reputation are well-known to householders throughout the United States. Its right to the name "Simmons" has been vindicated in controversies against persons or concerns who have used the name "Simmons" or simulations thereof on related merchandise and who either discontinued or were enjoined from such use.

15. Abraham Baker began a retail furniture business in Lawrence, Massachusetts, in 1935 under the name "Baker Furniture Company", which he continued until 1945. Baker began the upholstering business under the name "Simmonds Upholstering Company" in about 1943, on the premises of Baker Furniture Company. When he began the Simmonds Upholstering Company, in 1943, it is the considered judgment of the Court that the Defendant Baker knew and had known the Plaintiff's activities in this field and its reputation.

16. Plaintiff and Defendants are in competition in the sale of furniture. Plaintiff sells new upholstered furniture to retailers who sell it to the public. Defendants reupholster old furniture and also manufacture new upholstered furniture which they sell to the public by inducing customers to order their furniture restyled. Some of this

"restyled" furniture is also sold direct as new furniture. More than sixty per cent of Defendants' manufacture is of such allegedly "restyled" furniture, which is essentially new furniture with the exception that Defendants employ cotton filling salvaged from old furniture, but not necessarily the customer's own. Furniture ordered restyled is delivered quicker than furniture ordered only re-upholstered.

17. Defendants advertise extensively under the name "Simmonds Upholstering Company" via newspapers, radio, and television throughout New England, and parts of New York and Pennsylvania. The gross sales of the Defendant Corporation were as follows: (in millions of dollars) '59:2.4; '58:2.0; '57:2.45; '56:2.6; '55:1.7; '54:1.8; '53:1.65; '52:1.0; '51:1.2; '50:.9; '49:.6; '48:.55; '47:.4; '46:.25; '45:.2; '44:.1. These figures are graphically shown by Defendants' exhibit in support of Motion for Summary Judgment.

D. JURISDICTIONAL FINDINGS

18. The amount in controversy exceeded the amount of $10,000.00 exclusive of interest and costs.

19. The Defendants used the name "Simmonds" in interstate commerce.

20. Plaintiff corporation registered its mark "SIMMONS" in the United States Patent Office on three different occasions. All of the registrations are unrevoked and uncancelled.

E. CONFUSION

21. I find on all the evidence that the name "Simmonds" as it has been used in the conduct of the DEFENDANT'S business is indistinguishable when spoken from "Simmons", has been of a most confusing character, and that its use by the Defendants has not only in the past, but is likely in the future to cause confusion among the purchasing public in New England and elsewhere.

22. The Court finds that the name "Simmonds" has caused actual confusion in the minds of the general public. The Plaintiff corporation has received numerous inquiries and complaints about the character of the work done by the Defendant company which were intended for the Defendants. The Better Business Bureau of Metropolitan Boston received complaints from Defendants' customers who were under the impression that they had been dealing with Plaintiff. Defendants' salesmen received inquiries from customers in Massachusetts, in Rhode Island, in New Hampshire, in Connecticut and in New York as to whether they were connected with Plaintiff, and some of those salesmen told customers that they represented the Plaintiff. This is further evidenced by misdelivery to the Plaintiff by the United States Post Office of mail addressed to "Simmonds, Boston".

23. It is inescapably clear from an examination of the evidence that the Defendants knew that their use of the name "Simmonds" not only was likely to cause confusion in the public mind to the harm of the Plaintiff, but they also knew that customers were confusing them with the Plaintiff. The Court finds that the Defendant company knew that some of their salesmen were representing themselves as employees of Plaintiff or of a subsidiary of Plaintiff, or were failing directly or indirectly to inform a confused customer of the difference.

F. DEFENDANT' RIGHT TO USE NAME "SIMMONS".

24. Defendant's allegedly asserted right to use the name "Simmonds" is predicated upon an alleged bill of sale dated December 4, 1940, which in plain words conveyed to Abe Baker the "Simmonds Upholstering Company", established in 1899 and located on the date of the bill of sale at 471 Main Street, Bradford, Massachusetts. The Defendant Baker asserted his right in this suit and in an

earlier suit brought by the Simmonds Upholstering Company in the Superior Court of Rhode Island to enjoin another from using the Plaintiff's name "Simmons". It is clear that on all the evidence this document from "William B. Simmonds" is not authentic and therefore spurious, and was manufactured deliberately by Abe Baker in an attempt falsely to establish the right to the name of "Simmonds".

25. In December of 1940 the premises at 471 South Main Street, Bradford, consisted of a two-family dwelling and a garage. This has been clearly established by the testimony of previous owners.

26. The poll tax lists of Bradford, 1898 to 1942, have never shown a William B. Simmonds at 471 South Main Street, Bradford, and no "William B. Simmonds" ever registered to vote in Bradford, and the city directories of Bradford from 1898 to 1942 do not show either a William E. Simmonds nor a "Simmonds Upholstering Company". The Bradford-Haverhill telephone directories from 1926 to 1942 do not list a "William B. Simmonds" nor a "Simmonds Upholstering Company".

27. Lucian Jutras, who was hired by Simmonds Upholstering Company in 1950, testified that a short time after he was hired he saw five or six copies of bare printed letterheads, identical with that on which the purported Bill of Sale was written, in the hands of Baker's printer. Several months later, Jutras saw the "Bill of Sale", written out, on the desk of Baker's secretary and overheard Baker say, "It isn't aged enough". At a subsequent time, Jutras saw the original document lying on the window sill in Baker's office and was told by Baker that he was aging it. I find on all the evidence that the testimony of Lucian Jutras was true.

28. I find that the Defendant Baker stated to the Better Business Bureau of Metropolitan Boston in 1949 that he purchased the "Simmonds Upholstering Company" from

one "John P. Simmonds of Andover, Massachusetts", in 1938. This is also asserted in the handbooks used by the Simmonds Upholstering Co., Inc., to train its salesmen.

29. Abraham Baker, in a Consent Judgment entered in an action brought by the Federal Trade Commission, submitted that his claim that "Simmonds Upholstering Company" was founded in 1899 was false.

G. HARM TO PLAINTIFF'S NAME

30. The confusion between Defendants and Plaintiff, and the Defendants' fraudulent treatment of their customers tend to injure the good name of Plaintiff.

31. Defendants used "bait" advertising to mislead customers into believing that Defendants will reupholster and "restyle" their furniture at a low cost. Defendants, in fact, whenever possible, declined to sell at the advertised price and attempted to induce customers to buy a much more expensive "reupholstering" job. In instances where the sales were made at the advertised price, the defendants acting through agents, by various expedients, declined to honor the sale. In more than 60% of their sales, no portion of the article of furniture which the customers sent out to be reupholstered or "restyled" was returned to them, but in their place were returned completely different articles, and the customer's own furniture, without his knowledge, was stripped for salvage of its padding, or, if it was in good enough condition, was sold by the Defendants. The majority of the unit sales of the Defendant were in the $200 to $300 price range, to which many of the customers were manipulated by over-stating the yardage requirements for reupholstering and the cost of the materials to be used, with the Defendants further profiting from the salvage or re-sale of the customer's own furniture.

32. Over 600 complaints have been received by the Boston

Better Business Bureau and, in the case of confused customers, many complaints also were received by Plaintiff which indicated dissatisfaction with Defendants' work and methods of doing business.

H. LACHES

33. Plaintiff corporation became aware of the existence and activities of the "Simmonds Upholstering Company" for the first time in the summer of 1951 because of advertising which appeared in the New York City newspapers. The Simmonds Upholstering Company was promptly notified that it was infringing Plaintiff's registered trademark. Defendants, through their New York attorneys replied to Plaintiff in November of 1951, and declared there was no confusion, but declined to answer the Plaintiff's subsequent inquiry as to whether or not there was any person in the Defendants' organization whose name was "Simmonds".

34. Soon after the first awareness of the "Simmonds Upholstering Company" in New York, the Plaintiff learned that the Federal Trade Commission, the Department of Internal Revenue, and other governmental agencies were taking action against the Defendants. During the pendency of the Federal Trade Commission's action the Defendants' franchise system suddenly collapsed and the "Simmonds Upholstering Company" disappeared from all the more westerly cities in which it had appeared.

35. It is inescapably clear that the Plaintiff corporation was misled by the Defendants' false claim that "Simmonds Upholstering Company" was established in 1899, and Plaintiff had no means of establishing the falsity of Defendants' claim until after October 1957, when Mr. Baker testified in his successful suit in the Superior Court of Rhode Island of an alleged transaction between him and one "William B. Simmonds", at which time an alleged "Bill of Sale" was produced, but I am not convinced either that the Defendant has sustained his burden of proving by a preponderance

of the evidence that the circumstances surrounding the advertising and the notice already described in paragraph 33 is sufficient, in the light of all the other facts and circumstances, to show laches on the part of the plaintiff.

36. In 1956, Defendants' "Simmonds Upholstering Co., Inc." applied for registration of the name "Simmonds" in the United States Patent Office upon Defendant Baker's oath that the name had been continuously in use by the Applicant's its predecessors since 1899. After the name "Simmonds" was published by the Patent Office for opposition, Plaintiff filed opposition in September 1957, and raised the issue of fraud. After Plaintiff subpoenaed Abe Baker in that action, Simmonds Upholstering Co., Inc. confessed judgment in favor of Plaintiff and abandoned the application. This Consent to Judgment was filed in the Patent Office on April 28, 1958.

37. The suit by the Plaintiff company then followed on October 10, 1958.

38. Plaintiff did not acquiesce in the Defendants' use of the name "Simmonds" and brought this action within a reasonable time after the re-emergence of "Simmonds Upholstering Company," and the means of establishing the falsity of Defendants' claim to the name "Simmonds" became available.

39. I find as a fact that defendants have not maintained their burden of proof on the issue of laches.

I. SCAP

40. Simmons Cooperative Advertising Plan (SCAP) reimburses Plaintiff's dealers for money which they spend in advertising of Simmons' mattresses other than the Beautyrest mattress. The dealer accrues a credit of $.75 per such mattress purchased from Plaintiff and this credit is applied to the dealers' cost of advertising such mattresses in news-

papers. Plaintiff reimburses the dealers to the extent of one-half the cost of such newspaper advertising.

41. To be eligible for the SCAP plan, the dealer must maintain a specifically enumerated floor display of Plaintiff's products having a total wholesale value approximating somewhat less than $1,000.00. In addition, the dealer is required to covenant that he will not pay, or permit any manufacturer competing with Plaintiff to pay to his floor salesman for his sale of any mattress competitive with plaintiff's mattresses, price class for price class, a P.M. ("push money") or "spiff" greater than that paid to the dealer by Simmons.

42. In order to obtain the dealers' commitment, Plaintiff, after notifying the dealers to see their Simmons representative if they wished to become parties to this arrangement, sent each District Manager to sign up a SCAP contract with each of the dealers who indicated a desire to participate. Plaintiff sent written notice of SCAP to its dealers.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the parties and of the subject matter.

2. Plaintiff has the exclusive right to use the word "SIMMONS", including any simulation thereof, as a trademark or tradename in connection with the manufacture, sale, or repair of furniture and bedding.

3. United States trademark registration Nos. 137,699; 522,319; and 548,280 are valid; Plaintiff is the exclusive owner thereof and of all rights pertaining thereto; Plaintiff's right to use the registered mark has become incontestable under 15 U.S.C. 1065; and the certification of said registrations are conclusive evidence of Plaintiff's exclusive right to use the name "Simmons" in commerce or in connection with the goods specified in said certificates, under 15 U.S.C. 1115 b.

4. Defendants' use of the name "Simmonds" in the conduct of their business was intended and calculated to cause, was likely to cause, and has caused confusion with the Plaintiff among ordinary purchasers, and constituted unfair and unlawful competition, and therefore has infringed upon Plaintiff's rights in its name and trademark "Simmons" under said Federal trademark registrations and under the common law.

5. Defendants' fraudulently prepared Bill of Sale, which purported to give them a right to use the name "Simmonds", was intended to be used, and was actually used by them as a means not only to deceive this Court, but also had been used successfully to deceive another Court to believe that the Defendants had in fact succeeded to a pre-existing "Simmonds Upholstering Company" and had lawful claim to the name. I make this finding with complete exoneration of the distinguished counsel who came into this case long after this suit was brought.

6. Plaintiff was misled by the deception of Defendants in representing that they were established in 1899. Its failure to bring this action promptly after learning of Defendants' use of the name "Simmonds" was excusable and does not constitute laches or estoppel in view of the fraud and deception practised by the Defendants.

7. The Defendants have operated their business in a manner which is contrary to the interests of the public and in a manner which injures the good name of the Plaintiff, thereby causing damage to the Plaintiff.

8. The evidence in this case has not satisfied the Court that the Beautyrest Sign Program or Simmons Cooperative Advertising Plan is a violation of the Anti-Trust Laws.

9. The defense of unclean hands was not proved.

10. Plaintiff is entitled to a permanent injunction enjoining the Defendants, and each of them, from using the name "Simmonds", and from using any other name or repre-

sentation which would lead the public to believe that Defendants are associated with the Plaintiff.

11. Plaintiff is also entitled to damages to be determined at further hearing, and to its attorneys' fees, disbursements, and costs in this action.

ADDITIONAL FINDINGS OF FACT

12(a). Plaintiff's annual volume of business nationally and in the New England area was as follows:

	National	*New England*
1927	29,817,009.00	853,558.00
1930	28,124,946.00	1,153,527.00
1935	20,884,165.00	685,892.00
1940	30,591,711.00	1,242,177.00
1945	37,739,703.00	749,447.00
1950	109,879,358.00	4,470,312.00
1955	123,721,318.00	4,284,311.00
1959	115,257,236.00	3,609,240.00

INJUNCTION

November 16, 1961

After hearing upon the merits in the above-entitled action and because of the findings of trade-mark infringement and unfair competition by the defendants it is

ORDERED the defendants, their agents, servants, employees and attorneys and all persons in active concert and participation with them be and they hereby are restrained and enjoined from using the name "Simmonds" and from using any other name or representation which would lead the public to believe that defendants are associated with the Plaintiff.

By the Court

November 16, 1961 (s) WALTER J. HURLEY
Enter: *Deputy Clerk*

(s) WILLIAM T. MCCARTHY
United States District Judge